United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-1237

To be argued by
IRVING ANOLIK

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B
P/S

UNITED STATES OF AMERICA,

Appellee,

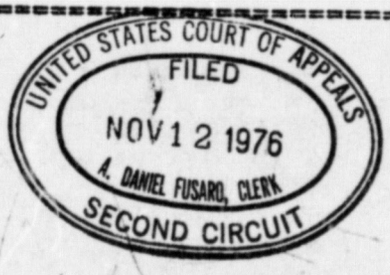
v.

JOSEPH FALCONE and
JOSEPH CURRERI,

Appellants.

ON APPEAL FROM JUDGMENTS AND COMMITMENTS OF THE UNITED STATES DISTRICT COURT FOR DISTRICT OF VERMONT

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC AND MOTION IN THE ALTERNATIVE FOR A STAY OF MANDATE PENDING CERTIORARI



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 76-1237

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UNITED STATES OF AMERICA,

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PETITION FOR REHEARING
AND PETITION FOR REHEARING
EN BANC AND MOTION IN THE
ALTERNATIVE FOR A STAY OF
MANDATE PENDING CERTIORARI

To the Honorable Circuit Judges Lumbard,
Feinberg and Meskill:

Honorable Sirs:

JOSEPH FALCONE and JOSEPH CURRERI, jointly and severally, respectfully petition this Court pursuant to its Rules, applying for a rehearing of its determination and opinion of November 1, 1976, wherein it affirmed the judgment of the United States District Court for the District of Vermont, convicting the appellants of fraudulent

transfer and concealment of the property of a bankrupt; the making of a false oath in regard to a bankruptcy proceeding; and the making of a false entry in a document relating to the property of a bankrupt; and conspiracy to violate the bankruptcy laws.

THE REASONS FOR GRANTING THE PETITION FOR REHEARING

1. We are asking for a rehearing herein because it is submitted that this Court apparently misinterpreted and misconstrued what occurred in the case at bar.

The opinion of this Court apparently fails to come to grips with the fact that Alburg Creamery was a wholly-owned subsidiary of Falcone Dairy Company when the credits for defective cheese were entered in the Falcone Dairy books during the period of July through December of 1971. This Court seems to chastise the defendants-appellants, and particularly Falcone Dairy, for not taking the credits immediately in 1971 when they were incurred.

This Court apparently overlooks the fact that such a procedure would have resulted in the complete destruction of the financial status of Alburg Creamery almost immediately. It would have dried up the cash flow

and would have severely affected the credit rating of the Creamery. Falcone Dairy relied to a very significant extent upon the production of Alburg Creamery for its cheese requirements. Had these credits been taken in 1971, Alburg Creamery, in all likelihood, would have gone out of business because of the fact that it would have owed Falcone Dairy, its parent, such a substantial amount of money.

It would have been nonsensical to have taken the credit at that time. Indeed, it is not likely that the credit would have been taken at all if the unfortunate fire had not destroyed Alburg Creamery on July 13, 1973.

It must be borne in mind that the credit had not been taken as a fiction, but was predicated upon the books and records, kept in the regular course of business of Falcone Dairy.

2. As we pointed out in our original brief, Agent Axton of the Federal Bureau of Investigation, who was largely responsible for the criminal prosecution being brought, not only misunderstood the accounting principles involved, but ironically conceded that he did not suspect that the books and records of Falcone Dairy were fraudulent.

On the contrary, he found nothing fraudulent in the books and records. Regular bookkeepers had duly entered the credits which were given not only in the period July through December of 1971, but at various other times. The credit which was actually taken was a perfectly proper one and was not a concealment at all. We submit that the expert accountants who testified, including Professor Michael of the University of Vermont, all stated that there was full disclosure in the books and records of Falcone Dairy and that the taking of the credits, while a bit unorthodox, were in no way improper.

This Court apparently erred in its interpretation of what actually occurred. At Slip Opinion Page 351 of the opinion of this Court, it notes, incorrectly, that "to justify the $210,000 credit, 40% of the cheese sent by Alburg to the Dairy in the last six months of 1971 would have to have been bad."

We submit that this conjecture is totally unsupportable and incorrect. Falcone Dairy purchased cheese over an extended period of time. Falcone Dairy stored this cheese for periods of time. Consequently,

the credits given from July through December of 1971 did not represent cheese shipped during that period, but primarily represented cheese which had been shipped during previous periods of time, because of the fact that the credits first came in when cheese was returned to Falcone Dairy during this period of time.

As a matter of fact, the Certified Public Accountant, Mario Accardi, testified that the entire amount of credits which were taken represented only about "5% of Falcone Dairy cheese sales for that period of time". (A-158)*

Moreover, he explained that the credits to customers during July through December of 1971 were for defective or otherwise unusable cheese. The fact that "fishy smelling" was used, does not necessarily mean that the cheese was fishy smelling because of any particular cause, but rather because of the unsanitary conditions which led to the resignation of Leo Laramee. It must be recalled that Laramee sent a letter of resignation stating that he could not continue because he could not maintain sanitary conditions adequately at the Alburg Creamery plant.

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*Numerals in parentheses preceded by the prefix "A" refer to pages of the Appendix; numerals without a prefix refer to pages of the official court reporter's minutes of trial.

Consequently, we are dealing here with 5% of the cheese sales of Falcone Dairy and not 40% of the production of the Creamery. This Court's assumption that the amount of cheese returned was 40% of its production is wholly incorrect since it is over an extended period of time that the cheese which was ultimately returned was shipped to Falcone.

The observation by this Court that Lucille Farm Products Inc., which had a one-half interest in Alburg output during the period of time, only had $1900 in credits for the entire year. First of all, we must bear in mind that Lucille Farm Products did not buy as much as Falcone Dairy. But, more important, Lucille Farm Products, Inc. used the cheese almost immediately. The nature of the disease, or other defect in the cheese, apparently was manifested by storage for a period of time. Selling it almost immediately and using it almost immediately would have failed to reveal the problem which eventuated at Falcone Dairy.

3. Nobody, least of all the Bankruptcy Trustee, ever questioned the fact that the entries in the books and records of Falcone Dairy were correct and proper. There is

no question whatsoever but that credits were given to customers for defective cheese. There is uncontradicted testimony in the record that the cheese which was returned had come to Falcone Dairy from Alburg Creamery. For this Court to speculate that because Falcone Dairy also obtained some cheese from other sources during this period of time, that the defective cheese came from another source, is to contradict the record, which is uncontradicted in the Court below. There was no evidence whatsoever that any cheese other than cheese emanating from Alburg Creamery was defective and the subject of the returns. This came from testimony not only of the appellants herein, but also from the bookeepers and was corroborated by the books and records of Falcone Dairy.

4. Professor Michaels and Certified Public Accountant Mario Accardi, both testified that there was full disclosure of all the entries herein and that the Bankruptcy Trustee was at no time misled by what had occurred. This Court seems to assume that there was a withholding of information from the Bankruptcy Trustee. We cannot see anything in the record that justifies this inference and we believe that this Court erred in making

that assumption.

5. The fact that Leo Laramee could not recall the complaints which the witnesses for the defense stated had been made, is not at all dispositive of the matter. The books and records of Falcone Dairy and the uncontradicted testimony of the bookkeepers and Falcone and Curreri, as well as the accountant, Accardi, all attest to the fact that the defective cheese had been received, delivered to customers, and then returned for credit to Falcone Dairy.

Philip Falivene, who was a principal of Lucille Dairy and who was present at Alburg Creamery during 1971, testified that he was completely dissatisfied with the way Laramee was running Alburg Creamery and that the place was not sanitary and was not running efficiently. (A-377-379)

6. No one was defrauded as a result of what occurred here since not only was Falcone Dairy itself insolvent, but it did not participate in any distribution of assets of the bankruptcy estate; so we are not dealing with any fraudulent scheme to obtain money. On top of

this, there is uncontradicted testimony that Falcone and Falcone Dairy kept pumping additional fresh monies into Alburg Creamery.

7. We repeat and reallege all of the arguments made in our original brief.

8. We submit that a perusal of the record herein discloses that, contrary to the finding of this Court and of the Court below, there was complete disclosure rather than concealment. There is no evidence that Falcone Dairy in any way, shape or form could have taken the credit in 1971, unless they wanted to put their wholly-owned subsidiary out of business. Such a procedure would have been self-destructive. This Court, in its opinion, seems to assume that such a course should have been followed. We submit that it is contrary to business practices and common sense to expect a parent to destroy its wholly-owned subsidiary when there is no basis in doing that, other than to bankrupt the subsidiary.

It was the unfortunate and calamitous fire of July 1973, which later resulted in the involuntary bankruptcy, that created the problem that originally arose herein. Had there been any desire to defraud anyone, it

seems unlikely and contrary to logic that the appellants herein would have consulted their Certified Public Accountant and a Vermont attorney before taking the credits. In addition, the accountants, Mr. Accardi, a Certified Public Accountant for over a quarter of a century, and Professor Michaels of the University of Vermont, both testified that no concealment occurred and that the accounting methods for entering the credits were perfectly proper.

We therefore ask this Court to rehear and reconsider this case, and upon such rehearing and reconsideration, to rule that no crime was committed and that the Court below erred in submitting the matter to the jury (UNITED STATES v. TAYLOR, 2 Cir. 1972, 464 F.2d 240).

9. In the event that this Court and Panel adheres to its original decision, we ask that this matter be submitted to all the active Judges of this Circuit for consideration en banc.

A 202 Affidavit of Personal Service of Papers

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-1237

UNITED STATES OF AMERICA,

Appellee,

- against -

JOSEPH FALCONE and JOSEPH CURRERI,

Appellants.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, STANLEY SIMON, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* Bronx, New York.

That on the 12th *day of* November, 1976, at One St. Andrew's Plaza, New York, N.Y., *deponent served the annexed* Petition for Rehearing, etc. *upon* U.S. Attorney, Southern District of New York, Attorney for *the* Appellee *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* attorney *herein.*

Sworn to before me, this 12th *day of* November, *19* 76.

Beatrice L. Stark

BEATRICE L. STARK
Notary Public, State of New York
No. 41-9196565
Qualified in Queens County
Commission Expires March 30, 1978

Stanley Simon

Print name beneath signature

STANLEY SIMON

MOTION IN THE ALTERNATIVE FOR STAY OF MANDATE PENDING CERTIORARI

We submit that in the case at bar there should never have been a submission to the jury because there was insufficient evidence as a matter of law to have warranted a jury in determining whether or not there had been a violation of the bankruptcy laws as specified herein.

In the event that this Court ultimately rejects the applications of the appellants herein, we respectfully request that the mandate herein be stayed pending a timely petition for a writ of certiorari to the United States Supreme Court.

DATED: November 12, 1976.

Respectfully submitted,

IRVING ANOLIK
Attorney for Appellants

CERTIFICATION

I, IRVING ANOLIK, attorney for petitioners, hereby certify that this petition for rehearing and motion for stay of mandate are made in good faith and not for the purpose of delay.

IRVING ANOLIK

DATED: November 12, 1976.